Court of Appeal denied NP's Petition for Rehearing and its Request for Publication. (Pet. App. D.) NP filed both a Petition for Writ of Certiorari, and a Petition for Review in the California Supreme Court. The State Supreme Court denied both of NP's petitions along with the Request for Publication on June 15, 2005. (Pet. App. G; Opp. App. 20.)

On November 8, 2005 NP filed its Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING REVIEW

A. The Questions Presented by NP Regarding Disqualification Procedures for Appellate Panels and Nonpublication of the Court of Appeal's Decision Do Not Warrant Review by this Court.

The majority of the Questions Presented by NP in its Petition center around its claims that its due process and equal protection rights under the Fourteenth Amendment to the United States Constitution were violated due to 1) a lack of state procedures for disqualification of an appellate panel, and 2) the Court of Appeal's reversal of the trial court's decision by means of an unpublished decision. (Pet. at p. i.) This case presents a poor vehicle for resolving these issues, both because such issues were not raised below and also because neither the unpublished decision nor state procedures regarding disqualification of appellate panels raise any substantive federal question.

1. Neither the Decision Below Nor the Record Raises the Questions Presented by NP Regarding Disqualification Procedures for Appellate Panels or Nonpublication of the Court of Appeal's Decision.

Supreme Court Rule 14 provides that a petition for review of a state-court judgment must contain: (1) specification of the stage in the proceedings, both in the court of first instance and in the appellate courts; (2) when the federal questions sought to be reviewed were raised; (3) the method or manner of raising them and the way in which they were passed on by those courts; and (4) pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears. *See* S. Ct. R. 14(g)(i). This Court placed these requirements "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." *Id.*

NP does not, nor can it, provide this Court with the above information because the constitutional questions raised by NP are new to this case. They were never raised or decided by the courts below. Neither the rules on publication nor the procedure for recusal of an appellate panel were briefed for the trial court or the Court of Appeal, the last court to review this case. Additionally, as to recusal, NP never petititioned the California Supreme Court for review on the ground that the appellate proceeding was illegally and prejudicially unfair. *See Kaufman v. Court of Appeal*, 31 Cal.3d 933, 939 (1982); *First Western Dev. Corp. v. Superior Court*, 212 Cal.App.3d 860, 867 (1989). When a petition raises questions which were not decided by the court below because they were not raised, any such defect is ordinarily

fatal to the petition. Robert L. Stern et al., Supreme Court Practice 459-460 (8th ed. 2002). More importantly, the proper medium for putting forward such a claim is to bring suit against the California courts. *See, e.g., Schmier v. Supreme Court of California*, 78 Cal.App.4th 703 (2000). No California court has been afforded an opportunity to review NP's challenge. As a result, this is not an appropriate case for resolving the constitutional questions raised by NP as to California court practices.

2. Even if Properly Raised, NP's Due Process and Equal Protection Rights Were Not Violated by the Appellate Court's Issuance of an Unpublished Opinion.

NP rests the bulk of its argument on the assertion that it was deprived of its right to due process because the Appellate Court did not publish its decision. Nonpublication of a decision does not violate any constitutional or statutory law. *Schmier*, 78 Cal.App.4th at 708-711; *Hart v. Massanari*, 266 F.3d 1155, 1163, 1180 (9th Cir. 2001). California's Constitution and its Legislature clearly disclose an intent that this state not require publication of every opinion of the intermediate appellate courts. Cal. Const., art. VI, § 14; Cal. Gov't Code § 68902 (Opp. App. 3.). Furthermore, the United States Constitution does not contain an express prohibition against issuing unpublished opinions. *Hart*, 266 F.3d at 1163 ("The Constitution does not contain an express prohibition against issuing nonprecedential opinions because the Framers would have seen nothing wrong with the practice.").

The Judicial Council of California is constitutionally empowered to adopt rules for court administration, practice and procedure, providing they are not inconsistent with statute. Cal. Const., art. VI, § 6 (Opp. App. 2.); *Schmier*,

78 Cal.App.4th at 708. Accordingly, the Judicial Council has adopted rules which provide publication of opinions of the courts of appeal only on a selective basis, leaving the final decision on whether to publish to the state's highest court, the Supreme Court of California. Cal. Rules of Ct., Rule 976(b) & (c) (Pet. App. O at p. O1-O2).[5] The appellate opinion in the present case did not satisfy the publication criteria and, therefore, was appropriately left unpublished.

If an appellate court issues an unpublished opinion, any person may request that the opinion be certified for publication. Cal. Rules of Ct., Rule 978 (Opp. App. 1.). Rule 978 sets forth the procedures to be followed by the reviewing courts. If the rendering appellate court does not honor a request to publish, Rule 978 obligates the Supreme Court to rule on the request. Cal. Rules of Ct., Rule 978 (Opp. App. 1.). In this case, the Court of Appeal did not certify its opinion because it did not warrant publication. (Pet. App. A at p. A1.) NP requested certification of the opinion for publication. In accordance with Rule 978, upon denying the request, the Appellate Court forwarded the opinion to the Supreme Court who likewise denied the request. (Pet. App. D & G.) Therefore,

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[5] Pursuant to Rule 976 of the California Rules of Court, an opinion by a court of appeal cannot be published unless it meets one or more of the following requirements:

(1) it establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

(2) it resolves or creates an apparent conflict in the law;

(3) it involves a legal issue of continuing public interest; or

(4) it makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

California's highest court, not the Court of Appeal, determined that the subject opinion failed to meet the standards for publication set forth in the California Rules of Court.

NP has failed to provide any reason why this Court should reverse the California court's consistent practice relating to publication of opinions. Contrary to NP's assertion, California's rules of publication do not contravene the doctrine of *stare decisis*, which obligates inferior courts to follow the decisions of courts exercising superior jurisdiction. *Schmier*, 78 Cal.App.4th at 710; *see also Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (Cal. 1962). The Court of Appeal is bound by the doctrine of *stare decisis* whether its decision is published or unpublished. *Ibid.*; *Auto Equity Sales, Inc.*, 57 Cal.2d at 455. As the court in *Schmier* succinctly stated, "the rules assure that all citizens have access to legal precedent, while recognizing the litigation fact of life expressed in *Beam* that most opinions do not change the law." *Schmier*, 78 Cal.App.4th at 711.

The majority of court of appeal opinions are not published for the simple reason that they are routine and will not have significance for anyone other than the litigants in those cases. *Id.* at 712; *Hart*, 266 F.3d at 1177-1178. "Our typical opinions in such cases add nothing to the body of *stare decisis*, and if published would merely clutter overcrowded library shelves and databases with information utterly useless to anyone other than the actual litigants therein and complicate the search for meaningful precedent." *Ibid.*

NP asserts that it "had no defense against the Appellate Court's unpublished decision" and that the Appellate Court chose to "abrogate [NP's] right by means of an unpublished opinion." (Pet. at p. 24.) However, nonpublication does not

equate with inadequate review. "Sufficient restrictions on judicial decision making exist to allay fears of irresponsible and unaccountable practices such as 'burying' inconvenient decisions through nonpublication." *Hart*, 266 F.3d at 1178, n. 35. The Appellate Court is still bound by the doctrine of *stare decisis*.

NP is also mistaken in its assertion that had the decision been published, it would have provided public notice to the world. (Pet. at p. 25.) Nonpublication of an opinion affects the precedential value of a case, it does not limit public access. California's Supreme Court addressed this in *Schmier*:

> Finally, in closing, we address appellant's erroneous notion that nonpublication equates with secrecy. It hardly needs mentioning that opinions, rulings and orders of the Court of Appeal are public records, open to all. Indeed, the nonpublished opinions are not only available to the public, but frequently become the subject of media broadcasts and publications. The fact that opinions are not published in the Official Reports means nothing more than that they cannot be cited as precedent by other litigants who are not parties thereto. But they are certainly available to any interested party.

Schmier, 78 Cal.App.4th at 712.

In sum, the Court of Appeal and California Supreme Court's decisions not to publish this opinion did not affect NP's right to due process or equal protection.

3. Even if Properly Raised, NP's Due Process and Equal Protection Rights Were Not Violated by the State's Procedural Rules Regarding Recusal of Appellate Judges.

NP contends that California provides no procedure to disqualify an appellate judge. However, this statement is blatantly false. The State of California has set specific standards for disqualifying Court of Appeal judges. Although the statutory procedures for disqualifying a trial judge do not apply to appellate judges, appellate judges must follow the standards set out in Canon 3E. *See* Cal. Code Civ. Proc. § 170.5(a). Moreover, California follows the federal rule prescribing that each appellate justice must decide whether he or she should withdraw from an appeal because of an inability to be impartial. 28 U.S.C. § 455; *Kaufman*, 31 Cal.3d at 938-39; *First Western Dev. Corp.*, 212 Cal.App.3d at 867.

Canon 3E of the California Code of Judicial Ethics sets forth general and specific grounds for which an appellate justice "shall" disqualify himself or herself. The Canon's provisions concerning disqualification of an appellate justice are intended to assist justices in determining whether recusal is appropriate and to inform the public why recusal may occur. Cal.C.Jud.Ethics, Canon 3E, Commentary. Pursuant to Canon 3E, the general standards for an appellate justice's disqualification are:

> An appellate justice shall disqualify himself or herself in any proceeding if for any reason:
>
> (a) the justice believes his or her recusal would further the interest of justice; or
>
> (b) the justice substantially doubts his or her capacity to be impartial; or

> (c) the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial.

Cal.C.Jud.Ethics, Canon 3E(4) (Opp. App. 9.); *see also Zaremberg v. Superior Court*, 115 Cal.App.4th 111, 114, n. 4 (2004).[6]

In fact, NP followed these rules in the state courts below. NP first requested recusal of the appellate panel after the City submitted transcripts of a settlement offer made in open court to the Appellate Court. (Pet. App. B.) The Appellate Court ordered the documents removed from the record and sealed after the Presiding Justice for the First Appellate District's Division Four, who was not assigned to the case, reviewed them. NP's first request was therefore denied because the panel did not review the documents and could not have been prejudiced. (Pet. App. B.) NP later submitted a second recusal request on the basis that the panel had issued a ruling adverse to NP prior to this appeal. (Opp. App. 13.) Again, NP's request was correctly denied. (Pet. App. C.) A prior adverse ruling against a litigant does not warrant recusal. *First Western Dev. Corp.*, 212 Cal.App.3d at 867. Thus, an adequate procedure is available in state court for recusal of appellate justices and NP utilized the process.

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[6] Disqualification is also required in specific instances as set forth in Canon 3E(5), none of which apply in this situation. Cal.C.Jud.Ethics, Canon 3E(5)-(h) (Opp. App. 9-12.).

B. The Decision of the California Court of Appeal Was Correct.

1. The Appellate Court Properly Rejected NP's Inverse Condemnation Claim as Being Time Barred.

In its Petition, NP asserts that "[t]he Appellate Opinion, while it conceded there was a governmental taking of NP's private property, defied binding California and U.S. Supreme Court precedent in order to effect a politically popular but legally unsound, unfair and discriminatory result towards NP." (Pet. at p. 2.) NP flagrantly misrepresents the Appellate Court's ruling. The court never determined that a taking occurred because it found that the statute of limitations barred recovery for such a claim.[7] The Appellate Court's opinion specifically states: "*We need not address whether a claim of failure to maintain an unusable fragment of a public road can constitute inverse condemnation* because it is equally well settled that statutes of limitations apply to inverse condemnation actions for damage to property (three years) or a physical taking of property (five years)." (Pet. App. A at p. A8 (emphasis added).) Thus, the court never reached an opinion as to whether a taking had occurred because NP's claim was time barred.

The Appellate Court's statute of limitations analysis was accurate and in accordance with the applicable law.

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[7] Where, as here, an action is time barred, the right to bring suit on a claim that could have been maintained has expired. The statute of limitations affects a party's remedy. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate. *Estate of Schaeffer*, 53 Cal.App. 493, 495 (1921). The limitation period's application effectively results in a summary judgment preventing assertion of any claim, whether meritorious or not. *Sanchez v. South Hoover Hospital*, 18 Cal.3d 93, 103 (1976).

Nowhere in NP's Petition does it directly challenge the legal standard for statute of limitations that was applied by the Appellate Court. NP does not attempt to cast doubt on the Court of Appeal's reliance on California Code of Civil Procedure section 338 (inverse statute of limitation) or case law that clearly establishes that NP's claim was brought decades after the statute of limitations began to run. Thus, NP has failed to petition this Court to review the primary basis for the Court of Appeal's inverse decision, i.e., that the trial court incorrectly found that a remedy for inverse condemnation could be sought when the statute of limitations had run many times over.[8]

The appellate opinion provides that none of the facts in the record supported the trial court's finding that NP could be awarded damages for its inverse claim. As the Appellate Court correctly noted, if a taking had ever occurred, it took place decades before NP purchased the Fish property. The court reasoned, "[a] cause of action for inverse condemnation accrues 'when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property' (*Smart v. City of Los Angeles* (1980) 112 Cal.App.3d 232, 235) and the damage is 'sufficiently

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[8] NP's Petitions for Writ of Certiorari and for Review by the California Supreme Court were similarly flawed in that they lacked any reference to the statute of limitations finding. As the City explained in its responsive pleadings to NP's petitions to the state Supreme Court, the failure to raise an issue in a petition prevents review of the issue. Specifically, under Rule 28(e)(2) of the California Rules of Court, only issues set forth in the petition and the answer, or fairly included in them, need be considered by this Court. The Court has broad discretion to deny review of issues not properly raised in a petition for review. *People v. Rios*, 23 Cal.4th 450 (2000); *Snukal v. Flightways Mfg., Inc.*, 23 Cal.4th 754, 772-73 (2000). The California Supreme Court subsequently denied NP's Petitions for Review and Writ of Certiorari. (Opp. App. 20.)

appreciable to a reasonable man.' (*Mehl v. People ex rel. Dept. Pub. Wks.* (1975) 13 Cal.3d 710, 717.)" (Pet. App. A at p. A8.) Further support for the court's holding can be found in numerous cases. *See, e.g., Monesian v. County of Fresno*, 28 Cal.App.3d 493, 500 (1972); *Aaron v. City of Los Angeles*, 40 Cal.App.3d 471, 491-492 (1974); *CAMSI IV v. Hunter Technology Corp.*, 230 Cal.App.3d 1525, 1534-35 (1991).

The court also examined the various undisputed facts in the record that demonstrate the decades of obvious and substantial interference with the property's use and enjoyment that preceded NP's acquisition of the Fish lots. (Pet. App. A at p. A9.) Based on these material facts, it concluded by stating:

> any taking of property occasioned by the closure of Edgemar to vehicular access occurred in 1967 at the latest, and the statute of limitations began to run at that time. The trial court's finding to the contrary is not supported by the evidence. NP's 2001 lawsuit for inverse condemnation is thus barred by the statute of limitations, and the judgment awarding NP compensation for the taking must be reversed.

(Pet. App. A at p. A12.)

NP attempts to argue that the Appellate Court erroneously ignored the trial court's factual findings and relied on evidence outside of the record to conclude that no taking had occurred. However, the piece of evidence that NP suggests was improper was a freeway agreement from 1954, which the Appellate Court confirmed was not before the trial court. (Pet. at pp.19-20.) The Appellate Court did not rely on the freeway agreement, as is clear from the court's decision. Rather, the court makes note of the agreement without further comment and goes on to trace

the evidence that was in front of the trial court related to the legal status of Edgemar. (Pet. App. A at pp. A4-A5.)

The Appellate Court's decision describes how the road was physically cut off from the street system by construction of Highway 1 in 1957. The court quoted the trial testimony establishing the time at which access to Edgemar ceased:

> [City Engineer] Holmes testified that the highway construction included the closure of Edgemar in late 1956, when it was 'buried under close to a hundred feet of fill.' Holmes explained that Edgemar was further obstructed by the State's placement of a 'steel guard rail and a fence that blocks Edgemar Road at the edge of their concrete spillway.' NP's civil engineering expert, Louis Arata, agreed that Edgemar was 'cut off' by Highway 1 sometime before November 1957, when the City incorporated.

(Pet. App. A at p. A4.)

The court also explained that the alternative access to the public street system from Edgemar, parcel 6, was vacated in 1967. (Pet. App. A at pp. A4, A9.) The Appellate Court drew these facts from the trial court record and concluded, "[t]he evidence is uncontradicted that there has been no vehicle access between Edgemar and the public street system since 1967, at the latest." (Pet. App. A at p. A9.) Thus, the freeway agreement did not factor into the court's holding that the inverse condemnation statute of limitations began to run in 1967 at the latest and therefore, that it had run decades before NP brought its claim.

Moreover, the actual issues raised by this Petitioner merely dispute factual determinations of the court below. The Supreme Court Rules disfavor review of asserted erroneous factual findings or the misapplication of a properly

settled rule of law. S. Ct. R. 10. "Petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*; *see also* Stern, *supra*, at 459-460. NP concedes that the decision below turns upon its own facts, and that it will affect few others besides the litigants. (*See* Pet. at p. 25.) Additionally, NP suggests that the Appellate Court misapplied the law related to triggering the statute of limitations for its inverse condemnation and nuisance claims. (Pet. at p. 6, *citing Mehl v. People ex rel. Dept. Public Works*, 13 Cal.3d 710, 717 (1975).) NP is mistaken on all these assertions. However, regardless of whether NP's claims of factual errors and misapplication of the law are valid, they certainly do not justify this Court's review.

In the instant case, the Court of Appeal found that the challenged action occurred in 1967 at the latest. Therefore, "[a]ny action for inverse condemnation thus accrued decades ago, and in favor of the previous owner of the subject property."[9] (Pet. App. A at p. A10.) NP is barred from asserting a takings claim; thus, as a matter of law, NP has not and cannot prove a takings claim.

2. The Appellate Court Properly Rejected NP's Nuisance Claim.

The Court of Appeal also correctly found NP's nuisance claim to be time barred. The only contention in NP's

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[9] Because NP was not the property owner at the time the alleged taking accrued, it cannot state a claim for a taking. If the property allegedly taken is not owned by the plaintiff, there can be no claim for compensation. *See Pacific Gas & Electric Co. v. Hacienda Mobile Home Park*, 45 Cal.App.3d 519, 529-530 (1975); 2 Nichols' The Law of Eminent Domain § 5.01(5)(d) (Julius L. Sackman, Patrick J. Rohan, eds., rev. 3d ed. 2005). A subsequent owner has no "rights" that can be "taken"; therefore no compensation is due. *Id.*

present petition with regard to nuisance is that the Appellate Court considered improper evidence related to the cost of restoring Edgemar and connecting it to the public street system. (Pet. at p. 23.) NP again ignores the material facts relied upon by the court in an effort to discredit a valid judicial decision. The Appellate Court described the error at the trial court level as follows:

> Despite the closure of Edgemar to all vehicular traffic no later than 1967, the court found that NP's 2001 lawsuit was timely because Edgemar's obstruction was a 'continuing nuisance' that could be abated at any time by reconstructing the road to restore access to the Fish property. The evidence does not support the finding that the closure of Edgemar is a continuing nuisance, rather than a permanent one.

(Pet. App. A at p. A13.)

The opinion continues by reiterating black letter law that a permanent nuisance is one that, "'by one act a permanent injury is done [and] damages are assessed once for all.'" (Pet. App. A at p. A13 [Citing *Baker v. Burbank-Glendale-Pasadena Airport*, 39 Cal.3d 862, 868 (1985)].)[10] The Appellate Court in turn, found that any potential nuisance in the instant case, "is plainly permanent in nature" and barred by the statute of limitations when any potential offending action took place at the latest in 1967. (Pet. App. A at p. A14.)

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[10] It is well established that if a nuisance is permanent, the plaintiff must bring one action for past, present and future damage within three years after creation of the permanent nuisance. *Shamsian v. Atlantic Richfield Co.*, 107 Cal.App.4th 967 (2003); *see also Mangini v. Aerojet-General Corp.*, 12 Cal.4th 1087 (1996); *Capogeannis v. Superior Court*, 12 Cal.App.4th 668 (1993).

NP suggests that the Appellate Court based its conclusion about abatability on its mention of deposition testimony by NP's expert.[11] (Pet. at p. 23.) However, NP takes no issue, nor can it, with the court finding based on trial evidence that, "[a]bating the nuisance here would require the 'complete reconstruction' of Edgemar, as NP's engineering expert admitted at trial. Edgemar would have to be regraded, repaved, and widened. An intersection between Edgemar and Palmetto would have to overcome an 18 foot vertical gap between the two roadways." (Pet. App. A at p. A15.) These undisputed facts constituted the foundation on which the Appellate Court reached its decision. As such, the Court correctly found that any alleged nuisance was not abatable, making it permanent and time barred. Therefore, this Court should deny NP's request for review of this issue.

C. NP Has No Constitutional Right to Litigate Its Takings Claim in Federal Court.

NP argues that its constitutional rights have been violated by its inability to bring its takings claim in federal court. This claim has no basis in law. It is well settled that there is no constitutional right to vindicate federal takings claims in federal court. *Allen v. McCurry*, 449 U.S. 90, 103-04 (1980); *San Remo Hotel, L.P.*, 125 S.Ct. 2491, 2502 (2005). The Supreme Court has held that

[11] NP attempts to make a mountain out of a molehill from the court's reference to deposition testimony in the opinion. (Pet. at p. 23; Pet. App. A at p. A15.) The court's reference to "deposition" is a typographical error. Instead, that testimony came from Mr. Fromm, the author of the instant Petition for Review, at *trial*, where he stated that it was his recollection that his own expert told Mr. Fromm that it would cost $600,000 to reconstruct the road.

federal courts are not free to disregard 28 U.S.C. § 1738, which requires that federal courts give preclusive effect to state-court judgments, simply to guarantee that all takings plaintiffs can have their day in federal court. *San Remo Hotel L.P.*, 125 S.Ct. at 2502. "[I]t is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims." *See Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 84 (1984). "This is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules." *San Remo Hotel, L.P*, 125 S.Ct. at 2504; *see also Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 477 (1982).

An exception to Section 1738 will not be recognized unless Congress has clearly manifested its intent to depart from the full faith and credit statute. Congress has not expressed any intent to exempt from the full faith and credit statute federal takings claims. *Id.* at 2505. As the Supreme Court stated in *Allen v. McCurry*:

> There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Allen, 449 U.S. at 104.

NP contends that state courts are biased and cannot be trusted to render correct decisions on takings issues. However, state courts are constitutionally obligated to uphold federal law and this Supreme Court has reaffirmed its confidence in the ability of state courts to adjudicate state

and federal claims. *Id.* at 105; *Stone v. Powell*, 428 U.S. 465, 493-494, n. 35 (1976). Moreover, NP ignores the comprehensive evaluation given to this case by the California Appellate and Supreme Courts. The Appellate Court reviewed two recusal requests from NP and answered the second of the two with a detailed order regarding the court's decision to put documents under seal before they were reviewed by the panel. (Pet. App. B at p. B1.) Once the unpublished decision was issued, NP requested publication in a lengthy and detailed letter. The California Supreme Court reviewed both a Petition for Writ of Certiorari and a Petition for Review. In each instance, the state courts reviewed NP's arguments and opposition papers from the City.

In accordance with U.S. Supreme Court law, NP's takings cause of action was thoroughly and properly adjudicated in California's state court. NP has had its day in court and its Petition for Writ of Certiorari does not warrant further review.

D. The Issues Presented by NP Do Not Warrant Review under Rule 10 of the Supreme Court Rules.

NP's Petition does not warrant Supreme Court review. Review on a writ for certiorari is granted only for compelling reasons. Sup. Ct. R. 10. Supreme Court Rule 10 sets out the considerations guiding the Court's decision on whether to grant certiorari. When reviewing state court decisions, the Court considers the following:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10.

Rule 10 considers whether the subject decision is made by the state court of last resort. Thus, the rule suggests that decisions by state courts that are not the court of last resort are less important. There are good reasons for this view. First, a decision by a state intermediate appellate court is less likely to be considered outside of its jurisdiction. Second, the decision of the intermediate appellate court can be corrected later by the state court of last resort. Here, the California Court of Appeal rendered the decision subject to this petition. It is not the court of last resort. The California Supreme Court is, and it denied review of this case.

Even assuming the decision was rendered by a California court of highest resort, neither consideration is met by NP's petition. NP has not asserted that the state court decision conflicts with the decision of another state court of last resort or United States court of appeal. Although NP alleges that the Court of Appeal decision conflicts with relevant decisions of this Court and that of California's Supreme Court, NP does not point this Court to the cases in conflict. This Petition, quite simply, is an effort to obtain Supreme Court review of what NP incorrectly assesses as a misapplication of facts and a settled rule of law. Thus, NP has failed to demonstrate a valid reason justifying this Court's review.

CONCLUSION

This is a simple case of faulty pleading and of a record that fails to sustain any violation of NP's constitutional rights. Neither the decision below nor the record raises the Questions Presented regarding disqualification of an appellate panel and issuance of an unpublished decision. The decision of the California Court of Appeal was correct and in accordance with U.S. Supreme Court law. Thus, NP's takings and nuisance causes of action have been properly adjudicated. For these reasons, the City of Pacifica respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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California Rule of Court

RULE 978. REQUESTING PUBLICATION OF UNPUBLISHED OPINIONS

(a) Request

(1) Any person may request that an unpublished opinion be ordered published.

(2) The request must be made by a letter to the court that rendered the opinion, concisely stating the person's interest and the reason why the opinion meets a standard for publication.

(3) The request must be delivered to the rendering court within 20 days after the opinion is filed.

(4) The request must be served on all parties.

(b) Action by rendering court

(1) If the rendering court does not or cannot grant the request before the decision is final in that court, it must forward the request to the Supreme Court with a copy of its opinion, its recommendation for disposition, and a brief statement of its reasons. The rendering court must forward these materials within 15 days after the decision is final in that court.

(2) The rendering court must also send a copy of its recommendation and reasons to all parties and any person who requested publication.

(c) Action by Supreme Court

The Supreme Court may order the opinion published or deny the request. The court must send notice of its action to the rendering court, all parties, and any person who requested publication.

(d) Effect of Supreme Court order to publish

A Supreme Court order to publish is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion.

Cal. Const., art., VI, § 6.

(a) The Judicial Council consists of the Chief Justice and one other judge of the Supreme Court, three judges of courts of appeal, 10 judges of superior courts, 2 nonvoting court administrators, and any other nonvoting members as determined by the voting membership of the council, each appointed by the Chief Justice for a three-year term pursuant to procedures established by the council; four members of the State Bar appointed by its governing body for three-year terms; and one member of each house of the Legislature appointed as provided by the house.

(b) Council membership terminates if a member ceases to hold the position that qualified the member for appointment. A vacancy shall be filled by the appointing power for the remainder of the term.

(c) The council may appoint an Administrative Director of the Courts, who serves at its pleasure and performs functions delegated by the council or the Chief Justice, other than adopting rules of court administration, practice and procedure.

(d) To improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, not inconsistent

with statute, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute.

(e) The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court.

(f) Judges shall report to the Judicial Council as the Chief Justice directs concerning the condition of judicial business in their courts. They shall cooperate with the council and hold court as assigned.

Cal. Const., art., VI, § 14.

The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person.

Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

Cal. Gov't Code § 68902 Gov't

Such opinions of the Supreme Court, of the courts of appeal, and of the appellate divisions of the superior courts as the Supreme Court may deem expedient shall be published in the official reports. The reports shall be

published under the general supervision of the Supreme Court.

CALIFORNIA CODE OF JUDICIAL ETHICS
CANON 3. A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General. All of the judicial duties prescribed by law* shall take precedence over all other activities of every judge. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities

(1) Judge shall hear and decide all matters assigned to the judge except those in which he or she is disqualified.

(2) A judge shall be faithful to the law* regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law.*

(3) A judge shall require* order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require* similar conduct of lawyers and of all court staff and personnel* under the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice

based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status against parties, witnesses, counsel, or others. This Canon does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law.* A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

(a) A judge may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(b) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(c) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(d) A judge may initiate ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(e) A judge may initiate or consider any ex parte communication when expressly authorized by law* to do so.

(8) A judge shall dispose of all judicial matters fairly, promptly, and efficiently.

(9) A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The, judge shall require* similar abstention on the part of court personnel* subject to the judge's direction and control. This Canon does not prohibit judges from making statements in the course of their official duties or from explaining for public information the procedures of the court, and does not apply to proceedings in which the judge is a litigant in a personal capacity. Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials, cases and issues pending in appellate courts. This education exemption does not apply to cases over which the judge has presided or to comments or

discussions that might interfere with a fair hearing of the case.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information* acquired in a judicial capacity.

C. Administrative Responsibilities

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require* staff and court personnel* under the judge's direction and control to observe appropriate standards of conduct and to refrain from manifesting bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to ensure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary court appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall

avoid nepotism and favoritism. A judge shall not approve compensation of appointees above the reasonable value of services rendered.

(5) A judge shall perform administrative duties without bias or prejudice. A judge shall not, in the performance of administrative duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment.

D. Disciplinary Responsibilities.

(1) Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, the judge shall take or initiate appropriate corrective action, which may include reporting the violation to the appropriate authority.*

(2) Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action.

(3) A judge who is charged by prosecutorial complaint, information, or indictment or convicted of a crime in the United States, other than one that would be considered a misdemeanor not involving moral turpitude or an infraction under California law, but including all misdemeanors involving violence (including assaults), the use or possession of controlled substances, the misuse of prescriptions, or the personal use or furnishing of alcohol, shall promptly and in writing report that fact to the Commission on Judicial Performance.

E. Disqualification.

(1) A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.*

(2) In all trial court proceedings, a judge shall disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification.

(3) Ownership of a corporate bond issued by a party to a proceeding and having a fair market value exceeding one thousand five hundred dollars is disqualifying. Ownership of government bonds issued by a party to a proceeding is disqualifying only if the outcome of the proceeding could substantially affect the value of the judge's bond. Ownership in a mutual or common investment fund that holds bonds is not a disqualifying financial interest.

(4) An appellate justice shall disqualify himself or herself in any proceeding if for any reason:

(a) the justice believes his or her recusal would further the interest of justice; or

(b) the justice substantially doubts his or her capacity to be impartial; or

(c) the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial.

(5) Disqualification of an appellate justice is also required in the following instances:

(a) The appellate justice has appeared or otherwise served as a lawyer in the pending matter, or has appeared or served as a lawyer in any other matter

involving any of the same parties if that other matter related to the same contested issues of fact and law as the present matter.

(b) Within the last two years, (i) a party to the proceeding, or an officer, director or trustee thereof, either was a client of the justice when the justice was engaged in the private practice of law or was a client of a lawyer with whom the justice was associated in the private practice of law; or (ii) a lawyer in the proceeding was associated with the justice in the private practice of law.

(c) The appellate justice represented a public officer or entity and personally advised or in any way represented such officer or entity concerning the factual or legal issues in the present proceeding in which the public officer or entity now appears.

(d) The appellate justice, or his or her spouse, or a minor child residing in the household, has a financial interest or is a fiduciary who has a financial interest in, the proceeding, or is a director, advisor, or other active participant in the affairs of a party. A financial interest is defined as ownership of more than a 1 percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value exceeding one thousand five hundred dollars. Ownership in a mutual or common investment fund that holds securities does not itself constitute a financial interest; holding office in an educational, religious, charitable, fraternal or civic organization does not confer a financial interest in the organization's securities; and a proprietary interest of a policyholder in a mutual insurance company or mutual savings association or similar interest is not a financial interest unless the outcome of the proceeding could substantially affect the value of the interest. A justice shall make reasonable efforts to keep informed about his or

her personal and fiduciary interests and those of his or her spouse and of minor children living in the household.

(e) The justice or his or her spouse, or a person within the third degree of relationship to either of them, or the spouse thereof, is a party or an officer, director or trustee of a party to the proceeding, or a lawyer or spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the justice or of the justice's, spouse, or such a person is associated in the private practice of law with a lawyer in the proceeding.

(f) The justice (i) served as the judge before whom the proceeding was tried or heard in the lower court, (ii) has a personal knowledge of disputed evidentiary facts concerning the proceeding, or (iii) has a personal bias or prejudice concerning a party or a party's lawyer. The justice's spouse or a person within the third degree of relationship to the justice or his or her spouse, or the person's spouse, was a witness in the proceeding.

(g) A temporary or permanent physical impairment renders the justice unable properly to perceive the evidence or conduct the proceedings.

(h) The justice has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last two years has participated in, discussions regarding such prospective employment or service, and either of the following applies:

(i) The arrangement is, or the discussion was, with a party to the proceeding;

(ii) The matter before the justice includes issues relating to the enforcement of an agreement to submit a dispute to alternative dispute resolution or the appointment or use of a dispute resolution neutral.

For purposes of this paragraph, "party" includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding.

For purposes of this canon, "dispute resolution neutral" means an arbitrator, a mediator, a temporary judge appointed under section 21 of article VI of the California Constitution, a referee appointed under Code of Civil Procedure section ***638*** or ***639***, a special master, a neutral evaluator, a settlement officer, or a settlement facilitator.

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January 25, 2005

Justice Maria P. Rivera
First Appellate District Court
Division Four
350 McAllister
San Francisco, CA

Re: North Pacifica v. City of Pacifica
Appeal No. A 104951

Dear Justice Rivera:

This letter regards the above-captioned appeal, in which North Pacifica is the respondent, which is currently pending before Division Four. We have recently learned that the above appeal has been assigned to the panel of Justices Sepulveda, Reardon and Rivera.

This is the same panel of Justices that heard the appeal of *North Pacifica v. Coastal Commission*, A101434. The panel denied North Pacifica's appeal in that matter in an unpublished opinion on December 21, 2004. Although the fact that the panel has previously heard a case involving North Pacifica and is now hearing another case involving North Pacifica would not normally bear comment, we are experiencing some discomfiture in this particular circumstance due to the proximity in time between the two appeals.

We are in the process of preparing a Petition for Review to the Supreme Court in A101434. In doing so we are noticing that we have a reluctance to criticize that decision, because we do not wish to offend the panel as it is currently considering the appeal in A104951. Despite our efforts to put this juxtaposition aside, we nonetheless find that the fact that the two cases are before the same panel at virtually the same time is constraining our ability to make arguments critical of this panel's decision in A101434. The reality is that we believe, in a very palpable sense, this situation is chilling North Pacifica's First Amendment right to petition the Supreme Court for Review of the decision in A101434.

It is impossible to prepare papers criticizing the panel's decision in A101434 without at least considering the effect of those arguments on the panel's consideration of the current appeal. We have spoken to several other lawyers whose practice includes appellate work, and most of them have stated that they too have experienced this, and/or would feel the same way. We are enclosing declarations from some of these attorneys. (Ironically, many of them were unwilling to put a declaration to this effect before the Court due to the same fear of offending the Court.)

The lawsuit that underlies the appeal that is currently pending in A 104951 regards a judgment for $3,495,000 plus approximately $1,200,000 in legal fees and costs in respect to a finding of inverse condemnation of seven lots known as the "Fish lots" that are located in the City of Pacifica. This lawsuit does not raise *any* issues in common with the issues that were before the Court in A191434. Rather, A191434 involved a *different* property in the City of Pacifica, known as the Bowl. Although the Bowl

and the Fish are proximate to one another, the lawsuit in A101434 was against the Commission and not the City, and there was no issue of inverse condemnation in A101434. Rather, as this Court knows, in A101434 North Pacifica sought to restrain the Commission from holding a hearing on the issue of its jurisdiction on the grounds that the City's determination that the project was not within the Commission's jurisdiction was entitled to deference and could only be attacked by an administrative writ.

North Pacifica named the City of Pacifica as a real party in interest in A101434 not because North Pacifica was challenging any action of the City, but because the City's determination that North Pacifica's permits were not appealable was being challenged by the Commission, and North Pacifica was defending against that challenge. Thus A101434 was not, in any sense, a lawsuit *against* the City of Pacifica.

Although neither the real property in question nor the issues in the two lawsuits are related, the City of Pacifica has sought to confuse the two cases, in hopes of gaining some advantage, and moved to consolidate the two appeals. This Court rejected the City's application for consolidation. Neither is there any advantage in terms of judicial efficiency to have both cases heard by the same panel. North Pacifica hopes, therefore, that the panel would be willing to transfer the matter to a different division in order to avoid chilling North Pacifica's attempt to obtain review from the Supreme Court.

Although there is no specific precedent for this, the Justices have discretion to recuse themselves in the interest of justice, which would then require that the matter be transferred. The Courts are unified in their

protection of First Amendment rights and the legislature has codified these protections. Both the litigation privilege codified in Civil Code 47a and the SLAPP statutes protect citizens from negative repercussions for exercising their first amendment rights.

The more recent SLAPP statute, found at CCP Section 425.16 specifically defines the phrase "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue'" to include:

> "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law";
>
> "(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law";

CCP 425.16(d)

Thus here, North Pacifica's actions in seeking review of the Court's decision is clearly an act in furtherance of its rights of petition of free speech.

> Undergirding the immunity conferred by section 47(b) is the broadly applicable policy of assuring litigants "the utmost freedom of access to the courts to secure and defend their rights. . . ." (Albertson v. Raboff, supra, 46 Cal.2d at p. 380.) *We have recently reemphasized the importance of virtually unhindered access to the courts in several opinions.* In Silberg, supra, 50 Cal.3d 205, we said that the "principal purpose of section 47([b]) is to afford litigants . . . *the utmost freedom of*

> *access to the courts without fear of being harassed subsequently by derivative tort actions." (at p.* 213.) And, in Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal.3d 1157 [232 Cal.Rptr. 567, 728 P.2d 1202], we declined to permit the expansion of the abuse of process tort to include the alleged improper filing of a lawsuit; to do so, we reasoned, would remove existing barriers to the maintenance of malicious prosecution actions, requirements that we said "play[] a crucial rule in protecting the right to . . . judicial relief. . . ." (at p. 1170.) In Bear Stearns, supra, 50 Cal.3d 1118, we called the requirement of probable cause in malicious prosecution actions "essential to assure free access to the courts. . . ." (at p. 1131.) (See also Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal.3d 863, 872 [254 Cal.Rptr. 336, 765 P.2d 498] (Sheldon Appel) [malicious prosecution tort "carefully circumscribed so that litigants with potentially valid claims will not be deterred from bringing their claims to court. . . ."].)

Rubin v. Green, (1993) 4 Cal. 4th 1187, 1194

Obviously here, North Pacifica does not fear "harassment' from the panel, nonetheless it is impossible not to feel that there is a chance that it is risking losing a judgment of approximately $5 million for inverse condemnation and attorneys' fees if it criticizes the prior judgment in A101434 too forcefully. Such a risk cannot be ignored with equanimity, and it affects, and chills North Pacifica's First Amendment rights in the matter of A101434. If North Pacifica exercises its rights and vigorously seeks to overturn A101434 as it wishes to do, North Pacifica fears it

will antagonize the very same justices that will be deciding A 104951.

On the other hand, if North Pacifica stays silent in respect to A101434, even though it strongly disagrees with the Court's ruling in that case, it relinquishes any opportunity it has to overturn that result. This is an untenable situation which has solely occurred because, through happenstance, the very same judicial panel happens to be hearing both cases within the same operative time period.

To the extent that there is any judicial efficiency served by having both appeals heard by the same panel, that efficiency is minor indeed, since, as set forth above, the only similarity between the cases is that North Pacifica is a party to each appeal. On a balancing of benefits and rights, the fact that there is a serious chilling effect on North Pacifica's First Amendment Rights to speak freely and petition the courts must outweigh the slight, if any, benefit conferred by having the same panel hear both cases. If this case A104951 were simply referred to a different panel, NP's First Amendment Rights would not, even arguably be chilled, NP could freely express its objections and appeals concerning A191434, and justice could be served by having another judicial panel consider the pending appeal in A104951.

We would, therefore, with the greatest respect, request that you voluntarily recuse yourself from hearing case A 104951 so that it may be referred to a different panel and the judicial process as envisioned by the First

Amendment of the Constitution may, without fear or chill, take its course.

Respectfully submitted,

/s/ Keith Fromm
KEITH FROMM

/s/ Jaquelynn Pope
JAQUELYNN POPE

Encs.
cc: Joel Jacobs, Natalie West (including enclosures)

S133553

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Jun. 15, 2005)

NORTH PACIFICA LLC, Petitioner

v.

COURT OF APPEAL FIRST APPELLATE DISTRICT DIVISION FOUR, Respondent;

CITY OF PACIFICA, Real Party in Interest.

Petition for writ of review DENIED.

GEORGE
Chief Justice